STATE OF MICHIGAN

COURT OF APPEALS

VERNE JEFFRIES,

Plaintiff-Appellant,

v

CONSUMERS ENERGY and NUCLEAR MANAGEMENT CO.,

Defendants-Appellees.

UNPUBLISHED
July 5, 2005

No. 253009
Jackson Circuit Court
LC No. 01-003209-CZ

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff Verne Jeffries appeals as of right from an order granting defendants Consumers Energy (Consumers) and Nuclear Management Co.'s (NMC)[1] motions for summary disposition pursuant to MCR 2.116(C)(4), MCR 2.116(C)(8), and MCR 2.116(C)(10).[2] The trial court determined that plaintiff's racial disparate treatment claims under the Elliott-Larsen Civil Rights Act (CRA)[3] were preempted by § 301 of the federal Labor Management Relations Act (LMRA),[4]

[1] NMC took over management of Consumers' Palisades Nuclear Power Plant in July of 2001. Plaintiff was allowed to amend his complaint to add NMC as a named defendant.

[2] Plaintiff's complaint was originally filed as part of a multi-plaintiff suit against Consumers for racial discrimination. The cases were severed below, but were reconsolidated for purposes of discovery. All but four claimants settled following mediation. The claims of the four remaining plaintiffs were dismissed following discovery due to federal preemption and for failure to create an issue of material fact. The appeals of the three other remaining claimants are being considered along with that of plaintiff in Docket Nos. 253359, 255560, and 255561.

[3] MCL 37.2101 *et seq.* The relevant section of the CRA provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . . [MCL 37.2202(1)(a).]

and that plaintiff failed to establish a prima facie case of racial discrimination under either a disparate treatment or hostile work environment theory.[5] Although we find that the trial court improperly determined that plaintiff's disparate treatment claims under the CRA were preempted by federal law, we affirm the dismissal of these claims pursuant to MCR 2.116(C)(10). However, we reverse the trial court's dismissal of plaintiff's hostile work environment claims, as we find that plaintiff presented sufficient evidence to create a genuine issue of material fact and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Plaintiff, an African-American, began working for Consumers in 1983 as a janitor at its Palisades Nuclear Power Plant. In 1989, he transferred into the radiation waste department and was promoted to a senior radiation waste material handler (Radwaste Handler A) in 1993. Radwaste handlers undergo more direct, frequent, and continual exposure to radiation than most other positions at the plant. The handlers rotate positions to equalize radiation exposure among the employees and must continually monitor their dosage. Due to the dangers of radiation exposure, plaintiff, along with several other radwaste handlers, applied on several occasions for posted positions in the mechanical maintenance department. These positions were not only safer, but also provided higher pay and better advancement opportunities. According to the collective bargaining agreement, Consumers was required to hire qualified applicants by seniority.

In 1999, plaintiff filed a grievance when Consumers posted several temporary positions for "Mechanical Repair Worker B," hired workers from outside the company, and then immediately upgraded the positions to permanent tool keepers.[6] In 2000, plaintiff applied for and was denied a position of stock keeper and denied a position of "Mechanical Repair Worker A." In response to his grievance regarding the filling of the repair worker position, Consumers indicated that plaintiff was only qualified for a "B" level position because he received a cautionary score on the required mechanical aptitude test and he lacked the requisite experience in a "B" mechanical position.[7] Finally, in 2001, plaintiff was denied a position as a temporary

(…continued)

[4] 29 USC 185(a). This section of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [29 USC 185(a).]

[5] The trial court dismissed plaintiff's disparate treatment claims relating to events occurring prior to April 5, 1998, as they were barred by the statute of limitations. Plaintiff does not challenge that ruling on appeal.

[6] Plaintiff was first denied a position of "Mechanical Repair Worker A" in 1997. However, as noted in footnote 5, any claims relating to this incident were barred by the statute of limitations.

[7] A "cautionary" score on the mechanical aptitude test borders between passing and failing. A (continued…)

tool keeper, which would have given him the necessary mechanical experience for future advancement. In his complaint, plaintiff alleged that defendants purposely promoted white employees into these desired positions and kept minorities in the radwaste department due to the higher level of danger and lower pay.

Plaintiff also alleged that defendants allowed for the existence of a racially hostile work environment. Plaintiff asserted that he removed racially negative graffiti from the containment area and bathrooms in the past three to five years. He removed the graffiti upon management's orders and, therefore, did not find it necessary to file a report with management. Plaintiff also testified in his deposition that he spoke to Marvell O'Flynn, another radwaste handler who has raised claims of racial discrimination, regarding racial comments made by a manager to Mr. O'Flynn. Plaintiff was told that a supervisor was fired after using a racially derogatory word in front of Larry Ledesma, another plaintiff in these actions.[8] Plaintiff also testified that he was aware of several instances in which nooses were placed around the plant, although he had never seen one and only knew specific details about two alleged incidents.[9] Plaintiff asserted that, since 2000, he has been the victim of daily jokes and comments relating to his inability to secure a position in the mechanical maintenance department, but that he never reported these incidents. The trial court, upon defendants' motion in limine, found much of this evidence inadmissible pursuant to MRE 402 and MRE 403 as plaintiff had not personally experienced the alleged racial hostility.[10]

On November 19, 2003, following discovery, the trial court dismissed plaintiff's claims. The court dismissed plaintiff's disparate treatment claims pursuant to MCR 2.116(C)(4). The court found that these claims were preempted by § 301 of the LMRA as their consideration required referencing the collective bargaining agreement. The court also found that plaintiff's disparate treatment and hostile work environment claims lacked a factual basis. Plaintiff failed to present evidence that he was qualified for the positions for which he was rejected and he failed to present any evidence that minority radwaste handlers were kept in that department due to the high level of radiation exposure. Furthermore, plaintiff was unable to present sufficient

---

(…continued)

candidate with a cautionary score is not automatically qualified for transfer into the mechanical maintenance department. Consumers presented evidence that it may waive a requirement for employment when none of the candidates possess all of the requisite qualifications. However, plaintiff's cautionary score on the aptitude test meant that he could only be hired into the mechanical maintenance department if he possessed the requisite experience. Furthermore, when plaintiff was denied these positions, there were other candidates who did possess all of the requisite qualifications.

[8] This supervisor was fired following this communication.

[9] A security guard admitted to placing one such noose in the factory. He was suspended for his conduct.

[10] We note that if the trial court wanted to properly exclude this evidence, it should have proceeded under MRE 602, rather than finding that the evidence was not relevant to plaintiff's claims.

admissible evidence regarding reported incidents to support his hostile work environment claim. This appeal followed.

II. Federal Preemption

We agree with plaintiff's contention that the trial court improperly dismissed his discriminatory disparate treatment claims pursuant to MCR 2.116(C)(4) based on the preemptive effect of § 301 of the LMRA.

> The authority of Congress to preempt state law is rooted in the Supremacy Clause of the United States Constitution. *Gibbons v Ogden*, 22 US (9 Wheat) 1; 6 L Ed 23 (1824). Whether a state claim is preempted by a federal statute "is, of course, a question of federal law." *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). "[W]here Federal questions are involved we are bound to follow the prevailing opinions of the United States supreme court." *Harper v Brennan*, 311 Mich 489, 493; 18 NW2d 905 (1945).[11]

The Michigan Supreme Court determined in *Betty v Brooks & Perkins* that state law discrimination claims are not automatically preempted by § 301 of the LMRA. State law rights which are independent of the collective bargaining agreement are not preempted by the federal statute.[12] A right is independent if the resolution of the claim does not require interpretation of the agreement.[13] A purely factual inquiry, such as one into the conduct and motivations of the employer, requires no interpretation of the agreement.[14] However, even if portions of the collective bargaining agreement are "relevant in determining the conduct and motives of defendant, this alone would not transform plaintiff's claim into a federal contract dispute within the ambit of § 301." Not every claim tangentially related to a collective bargaining agreement is intended to be preempted by federal law; only those requiring interpretation of the agreement.[15] A race discrimination claim does not require such interpretation. The right to be free from discrimination is nonnegotiable and cannot be waived in forming a contract.[16]

Plaintiff's disparate treatment claims do not require interpretation of the collective bargaining agreement. These claims do involve defendants' implementation of certain provisions of the agreement; *i.e.* those involving seniority and the qualifications for positions

---

[11] *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994).

[12] *Id.* at 278-279, quoting *Allis-Chalmers Corp v Lueck*, 471 US 202, 212-213; 105 S Ct 1904; 85 L Ed 2d 206 (1985).

[13] *Id.* at 279-280, quoting *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 407; 108 S Ct 1877; 100 L Ed 2d 410 (1988).

[14] *Id.*

[15] *Id.* at 287-288, quoting *Lingle*, *supra* at 409-410.

[16] *Id.* at 283-284.

within the mechanical maintenance department. Determining whether defendants discriminated against minority employees in implementing these provisions does not require interpretation of those provisions, only a factual inquiry into defendants' conduct and motives. Accordingly, the trial court improperly determined that plaintiff's disparate treatment claims were preempted by federal law.[17] However, as we find that the trial court properly dismissed plaintiff's claims pursuant to MCR 2.116(C)(10), we need not reverse the trial court's order.

III. Racial Discrimination

Plaintiff asserts that the trial court erred in concluding that defendants were entitled to summary disposition of his disparate treatment and hostile work environment claims pursuant to MCR 2.116(C)(10).[18] We review a trial court's determination regarding a motion for summary disposition de novo.[19] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[20] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[21] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[22]

A. Disparate Treatment

A plaintiff may prove disparate treatment by either direct or indirect evidence.[23] Absent direct evidence of discrimination, as in this case, a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*.[24] To establish a prima facie case under *McDonnell Douglas*, a plaintiff must prove that: (1) he was a member of a protected

---

[17] See, e.g., *Donajkowski v Alpena Power Co*, 219 Mich App 441; 556 NW2d 876 (1996); *Hall v Kelsey-Hayes Co*, 184 Mich App 277; 457 NW2d 143 (1990).

[18] The trial court also dismissed these claims pursuant to MCR 2.116(C)(8). As it considered all of the documentary evidence in rendering its decision, we will review the dismissal pursuant to MCR 2.116(C)(10) alone.

[19] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[20] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[21] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[22] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[23] *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003).

[24] *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

class; (2) he suffered an adverse employment action; (3) he was qualified for the position for which he applied; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.[25] If a plaintiff establishes a prima facie case, "a presumption of discrimination arises."[26] Thereafter, the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision.[27] Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext.[28]

There is no dispute that, as an African-American, plaintiff is a member of a protected class and that he suffered adverse employment actions when he was denied promotion to the mechanical maintenance positions for which he applied. However, plaintiff failed to present evidence that he was qualified for these positions. Plaintiff failed to refute defendants' evidence that passing the Bennett Mechanical Test was required for these positions and that plaintiff received only a "cautionary" score on this test.[29] Even though defendants presented his test into evidence, plaintiff merely asserted in his own affidavit that he had not failed any tests that were required for transfer into a mechanical maintenance position. "[M]ere conclusory allegations . . . devoid of detail" are insufficient to satisfy the obligation of a party opposing a motion for summary disposition.[30] Furthermore, plaintiff failed to establish that the adverse employment actions occurred under circumstances giving rise to an inference of racial discrimination. He failed to present any evidence that the employees selected for these positions were unqualified. We also note that white radwaste handlers who applied for the same positions were also denied promotion on the basis of lack of qualification. Accordingly, the trial court properly determined that plaintiff failed to meet his burden of establishing a prima facie case of disparate treatment.

As plaintiff failed to meet his initial burden, we need not consider whether defendants articulated a legitimate, nondiscriminatory reason for their employment decisions or whether this reason was mere pretext. However, we note that defendants did articulate such a reason for their employment decision—the fact that plaintiff was not qualified for the positions for which he applied, while the selected applicants were qualified. Plaintiff has presented no evidence that defendants adhered to the qualification standards for discriminatory purposes.

---

[25] *Id.* at 463.

[26] *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998).

[27] *Hazle*, *supra* at 464.

[28] *Id.* at 464-466.

[29] As noted previously, plaintiff's cautionary score bordered between passing and failing and meant that he was not automatically qualified for a position in the mechanical maintenance department.

[30] *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996).

B. Hostile Work Environment

Plaintiff asserts that the trial court improperly dismissed his claim that defendants maintain a racially hostile work environment. Plaintiff also contends that the trial court abused its discretion by excluding evidence regarding certain events contributing to his hostile work environment claim. To establish a prima facie case of a racially hostile work environment, a plaintiff must demonstrate that: (1) he belonged to a protected group; (2) he was subjected to unwelcome communication or conduct on the basis of his race; (3) "the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment;" and (4) the employer is responsible for the actions of its employees under the doctrine of respondeat superior.[31]

"[T]o survive summary disposition, plaintiff [must] present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances [the alleged conduct was] sufficiently severe or pervasive to create a hostile work environment."[32] "[W]hether an environment is 'hostile' can be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[33] However, a plaintiff must be aware of the unwelcome communication or conduct in order to allege that it specifically affected his work environment.[34] "A hostile work environment cannot stand as [an arbitrary barrier in the workplace] until there is some affirmative manifestation of it to the complaining party or parties, and then becomes actionable only when 'sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question."[35]

We agree with plaintiff's contention that the trial court erred in excluding evidence presented regarding the discovery of nooses around defendants' plant. We review the trial

---

[31] *Quinto, supra* at 368-369, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (alteration in original).

[32] *Id.* at 369. See also *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000).

[33] *Quinto, supra* at 370 n 9, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993).

[34] See, e.g., *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 317; 385 NW2d 778 (1986) ("We conclude that plaintiff cannot rely upon incidents of sexual harassment of which she was unaware to establish that she was subjected to a hostile work environment for purposes of the Elliott-Larsen Civil Rights Act."). In *Langlois*, the plaintiff learned that two other female employees had been sexually harassed by a supervisor after she reported her own single incident of harassment and the supervisor had been fired. As she was unaware of the incidents, they could not have affected her work environment. *Id.*

[35] *Id.*

court's evidentiary rulings for an abuse of discretion.[36] The trial court granted defendants' motion in limine to exclude this evidence on relevancy grounds pursuant to MRE 402:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

and MRE 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court determined this evidence to be inadmissible, as plaintiff did not actually see the nooses. However, there is no dispute that the nooses existed and a plant-wide committee of minority workers was formed in response to the threat. The noose has a long history as a symbol of racial violence and hatred. Certainly, the continuous discovery of nooses around the plant is relevant to an African-American employee's claim that he felt subjected to racial hostility in his place of employment. Accordingly, the trial court clearly abused its discretion in declining to consider this evidence.

It is also clear that the trial court improperly dismissed plaintiff's hostile work environment claim. There is strong evidence that a racially hostile environment exists at defendants' Palisades Nuclear Power Plant. Plaintiff raised serious allegations regarding highly improper racially-motivated conduct at defendants' plant. According to plaintiff's deposition testimony, he was directly affected by racial animus when he was order to remove racial graffiti, and when he became aware that several nooses were found around the plant and that racial comments were made to other minority radwaste handlers by supervisory personnel on two prior occasions.[37] This evidence was corroborated during discovery by the depositions and affidavits of several other claimants. This conduct and communication, if proven, would certainly be sufficiently severe or pervasive to create a hostile work environment.[38] There is abundant

---

[36] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[37] Although plaintiff did not actually see the nooses or hear all the racial epithets being used around the plant, these statements are not hearsay and, therefore, are admissible to establish plaintiff's hostile work environment claim. Evidence of the incidents involving nooses and racially derogatory comments merely establish the existence of these statements, and obviously not the substance of the underlying racial epithets. Similarly, in a defamation action, a plaintiff must first establish the publication of a communication, the very fact that a statement was made. The existence of that statement is the crux of the plaintiff's action. See *Colista v Thomas*, 241 Mich App 529, 538-539; 616 NW2d 249 (2000).

[38] Plaintiff also alleged that he was under stress due to constant comments by unnamed workers
(continued…)

evidence that plaintiff and other minority claimants worked every day in a climate where the use of racially derogative words and symbols of racial hatred were commonplace. In light of this evidence, plaintiff created a genuine issue of material fact that he was subjected to unwelcome communication or conduct on the basis of his race and this communication and conduct placed him in a threatening and hostile work environment.

Plaintiff also presented sufficient evidence regarding defendants' knowledge of this climate to overcome defendants' motion. To hold an employer liable under the doctrine of respondeat superior, a plaintiff must present evidence that the defendant had notice of the hostile work environment and failed to take prompt and adequate remedial action.[39] Defendants clearly had notice of the presence of racially negative graffiti in the plant, as management ordered its removal. There was also evidence that defendants had notice of general race-based issues in the plant. Evidence was presented that racially derogatory comments were often made in the presence of supervisors, who either took no action or laughed. Defendants were also aware of the discovery of nooses. Defendants' investigation of one such incident resulted in the suspension of a security guard. There was also evidence that an employee-based minority advisory panel had presented their concerns regarding these incidents to plant management.

Defendants did take some action regarding these incidents and the general racial hostility in the plant; however, a factual issue remains regarding the adequacy of these measures. Defendants did implement a diversity training program. Even though the racially hostile atmosphere had existed for several years, the program was not scheduled to begin until 2003. There was evidence that supervisors took no action upon hearing racially negative comments in the plant. An armed security guard who admitted to placing a noose on plant grounds received only a short suspension. In response to the discovery of other nooses, defendants placed a non-specific sign on the fabrication shop door that "Offensive comments or actions are no joking matter." There was also evidence that other incidents were never investigated as the nooses were simply thrown away. In light of this evidence, dismissal of plaintiff's hostile work environment claim was improper.

We affirm the trial court's dismissal of plaintiff's disparate treatment claims pursuant to MCR 2.116(C)(10). However, we reverse the trial court's court dismissal of plaintiff's hostile work environment claims and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen

(…continued)

around the plant regarding his inability to secure a mechanical maintenance position. However, plaintiff never asserted that these comments were based on race and he never reported the incidents to defendants.

[39] *Chambers, supra* at 312-313.